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6	IN THE UNITED STATES DISTRICT COURT	
7	FOR THE DISTRICT OF ARIZONA	
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9	Holly Martenson,	No. CV09-1314-PHX-NVW
10	Plaintiff,	ORDER AND OPINION
11	vs.	[Re: Motion at Docket 106]
12	DC Financing at al	
13	RG Financing, et al., ) Defendants.	
14	Defendants.	
15		
16	Before the Court is the Motion to Dismiss Plaintiff's Third Amended Complaint filed	
17	by Defendants JL Financing and RG Financing (Defendants). (Doc. 106.) The Court wil	
18	grant the motion.	
19	Plaintiff concedes that this Court's previous summary judgment order (Doc. 98)	
20	disposes of all but one cause of action alleged in the third amended complaint (see Doc. 107)	
21	at 2 & n.2). The remaining cause of action is for "[w]rongful foreclosure/breach of contract."	
22	(See Doc. 99 at 17.)	
23	Defendants have now foreclosed on Plaintiff's home twice. As the first foreclosur	
24	was pending, Plaintiff filed suit in this court alleging "wrongful foreclosure/breach o	
25	contract." Plaintiff did not succeed in stopping the foreclosure, but following the trustee's	
26	sale, Defendants recorded a notice of rescission. Thus, Defendants unwound the first	
27	foreclosure and returned the parties to their previous positions. Defendants then served	

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Plaintiff with a new notice of default and proceeded with a new foreclosure. The trustee's sale in that foreclosure took place September 30, 2010.

Plaintiff's current cause of action for "wrongful foreclosure/breach of contract" still continues to challenge the *first* foreclosure, *i.e.*, the foreclosure that Defendants unwound. Plaintiff argues that the cause of action remains viable in her new complaint because, "[r]egardless of whether the second attempt to take her home was legal... defendants cannot shed their initial liability by backing up and running over her the right way." (Doc. 107 at 2.) That "initial liability," says Plaintiff, comprises the attorneys' fees and emotional distress she incurred in attempting to challenge the first foreclosure.

Concerning attorneys' fees, Plaintiff appears to believe that her first claim for wrongful foreclosure/breach of contract and Defendants' subsequent rescission of the first trustee's sake makes her a "successful party" within the meaning of the Arizona statute that permits an award of attorneys' fees in contract-based actions. *See* A.R.S. § 12-341.01. But Plaintiff has not moved for attorneys' fees. *See* LRCiv 54.2 (governing procedure for seeking attorneys' fees). Nor has Plaintiff cited any authority showing that attorneys' fees incurred defending the first foreclosure can be claimed as damages after the first foreclosure has become moot. Plaintiff's request for attorneys' fees therefore does not support her wrongful foreclosure/breach of contract cause of action.

Concerning emotional distress damages, Plaintiff has pleaded a contract-based cause of action and therefore cannot recover non-economic damages, such as for emotional distress. *Country Escrow Serv. v. Janes*, 121 Ariz. 511, 513, 591 P.2d 999, 1001 (Ct. App. 1979). Accordingly, this remedial request does not validate a continuing wrongful foreclosure/breach of contract cause of action.

IT IS THEREFORE ORDERED that Defendants' Motion to Dismiss Plaintiff's Third Amended Complaint (Doc. 106) is GRANTED. This dismissal is without prejudice to a subsequent motion to amend under Rule 15(a)(2), but Plaintiff must file such a motion, if desired, by December 10, 2010. Otherwise, Plaintiff's claims against Defendants JL

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1	Financing and RG Financing will be dismissed with prejudice and without further notice to		
2	Plaintiff.		
3	DATED this 9 <sup>th</sup> day of November 2010.		
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5	/s/ JOHN W. SEDWICK UNITED STATES DISTRICT JUDGE		
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